113 - 609

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1213.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, APPELLANT,

vs.

CHARLES A. MOLITOR.

No. 1214.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES A. MOLITOR.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED NOVEMBER 15, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1213.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, APPELLANT,

vs.

CHARLES A. MOLITOR.

No. 1214.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES A. MOLITOR.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print
Stipulation of counsel	1	1
Bill of complaint	4	2
Answer	13	5
Replication	27	12
Final decree	29	12
Order to show cause	32	13
Decree or judgment	35	14
Certificate of division in opinion	37	14
Order allowing appeal	52	20
Bond on appeal	54	21
Bond on writ of error	57	22
Clerk's certificate	60	23
Citaton on appeal	62	23
Writ of error	64	24
Citation on writ of error	66	25

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 United States Supreme Court.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Appellant,

vs.

CHARLES A. MOLITOR, Appellee;

and

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Plaintiff in Error,

vs.

CHARLES A. MOLITOR, Defendant in Error.

It is hereby stipulated and agreed as follows, to wit:

1st. That the foregoing entitled causes represent one and the same case, which is brought to this court both by appeal and by writ of error out of greater caution.

II.

That one transcript of the case only need be used for both entitled causes.

III.

2 That the proceedings by which it was sought to have said Charles A. Moliter punished for contempt, as stated in the certificate of division of the court, were regularly taken, and the same need not be inserted in the transcript.

IV.

That the citations herein may be made returnable to this court on the twenty-first day of November, 1884, and that the causes may be submitted to the court for its decision on the twenty-fourth day of November, 1884, upon briefs to be filed on or before said day by the respective counsel of the parties.

V.

All questions other than what are presented by the circuit court in its certificate of division are hereby waived. Both parties agree to file their briefs in the clerk's office of the United States Supreme Court on or before eleven o'clock on the said twenty-first day
3 of November, A. D. 1884. Either party not so filing a brief hereby waives a right to file a brief, and the causes, without such brief, shall stand submitted on said twenty-fourth day of November, 1884, to this court for decision.

M. A. WHEATON,
Solicitor and of Counsel for The California Artificial Stone Paving Company in both entitled causes.

JOHN L. BOONE,
Solicitor for Defendant in Error in contempt proceeding herein referred to.

4 *Bill of Complaint.*

To the honorable the justices of the circuit court of the United States for the ninth circuit within and for the district of California, sitting in equity:

The California Artificial Stone Paving Company, a corporation created and existing under and by virtue of the laws of this the State of California, brings its bill against Charles A. Moliter.

And thereupon your orator complains and says: That heretofore, to wit, before the nineteenth day of July, in the year one thousand eight hundred and seventy, John J. Schillinger, of New York, was the original and first inventor of a certain new and useful invention in concrete pavements. That the same was a new and useful invention, and the following is a partial description of it: Said invention, while the material was in a plastic form, and making the pavement in detached blocks or sections, which hardened after being laid. Said invention also included fixing tar paper or its equivalent in the joint between the detached blocks or sections, to prevent the adjacent parts from adhering, thus forming an artificial stone block pavement, possessing all the advantages of a natural stone block pavement, at a greatly reduced cost.

5 That the same was not known or used by others before the said John J. Schillinger — said invention, and at the time of his application for a patent therefor had not been in public use or on sale for two years, nor abandoned, nor was it proved to have been abandoned. That the said John J. Schillinger, being so as aforesaid the inventor thereof, on the nineteenth day of July, A. D. 1870, upon due application therefor, did obtain the letters patent of the United States for the said invention, granting and securing to him and his assigns, for the full term of seventeen years from the last-named date, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention and improvement throughout the United States and the Territories thereof.

Said letters patent were issued in due form of law under the seal of the Patent Office of the United States, and were signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, and bore date the day and year last aforesaid, a description whereof and of said invention more fully appears in said letters patent, which said letters patent are in due form of law, and are ready in court to be produced by the plaintiff, or a duly authenticated copy thereof.

6 That afterwards, to wit, on the seventh day of May, 1871, upon due application therefor, and upon the surrender of the Commissioner of Patents of the United States of the letters patent last aforesaid, new letters patent were duly issued to the said John J. Shillinger for the same invention for the residue of the period then unexpired for which the said original patent was granted; that the letters patent so reissued were issued in due form of law, under the seal of said Patent Office, and were signed by the Secretary of the

Interior, and countersigned by the Commissioner of Patents of the United States, and were dated the day and year last aforesaid, and were delivered to the said John J. Schillinger, whereby there was secured to him, his heirs, administrators, or assigns, for the residue of said term of seventeen years from the said nineteenth day of July, A. D. 1870, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention hereinbefore mentioned and described, a description whereof and of said invention more fully appears in said reissued letters patent, which said reissued letters patent are in due form of law, and are ready in court to be produced by the plaintiff, or a duly authenticated copy thereof.

7 And your orator further shows that by a regular chain of assigment, made in writing, and recorded in the United States Patent Office, all the property in said reissued letters patent, and all rights and liberties by them conferred had been granted and conveyed within and throughout the whole of the State of California, by and from the said J. Schillinger to your orator, The California Artificial Stone Paving Company, prior to the 23rd day of December, 1876.

And your orator says that it is still the owner and holder within and throughout the State of California of said reissued letters patent, and of the rights, privileges, and liberties by them granted. That prior to the issuing of said letters patent, and said reissued letters patent, all proceedings were had and taken which were required by law to be had or taken previous to the issuance, or issuance respectively of letters patent, granting special rights and liberties for new and useful inventions.

And your orator further shows unto your honors that always since the grant of the first of said letters patent, in the exercise of the full and exclusive right and liberty, so granted as aforesaid, said Schillinger and your orator each while the owner thereof have made constructed, used, and vended to others to be used, the said

8 improvement so patented, and has had and maintained until the infringement hereinafter complained, the possession of the said improvement and invention, under and by virtue of said letters patent, and have never acquiesced in any invasion or infringement of their said rights.

And your orator further shows unto your honors that the respondent herein having full knowledge of the premises, and in violation of your orator's exclusive right, liberty, and privilege as aforesaid, and utterly disregarding the same, have since the 23rd day of December, 1876, and since the assignment to your orator of the said reissued letters patent, and before the filing of this bill of complaint, without the license of your orator, or any license under said patent, in the said district and State of California, have manufactured and used, and still continue to manufacture and use, pavements embracing the improvements and invention described in said reissued letters patent, and so secured to your orator as aforesaid.

And your orator alleges that the pavements made and used by the respondent are infringements of said reissued letters patent and

were made according to the invention therein described and thereby protected and secured to your orator as aforesaid, and contrary to law and the form of the statutes of the United States in such cases made and provided.

9 And plaintiff further say- that on or about the third day of February, A. D. 1877, a suit at law was commenced in the circuit court of the United States of America, in the ninth circuit, and in the State of California, by your orator, The California Artificial Stone Paving Co., who was then the owner of said reissued letters patent and of the rights, liberties, and privileges by them granted and conferred within and throughout said State, against the Oakland Bank of Savings, to recover damages for an infringement of said reissued letters patent. That in said action the validity of said letters patent was put in issue by the pleadings and fully adjudicated on the trial thereof, and said court on or about the 15 day of March, A. D. 1878, adjudged said letters patent to be valid in all respects and in full force and effect, and entered a final judgment for damages and costs against the defendant and in favor of the California Artificial Stone Paving Company. That in said action said court then and there had full jurisdiction of the parties to and subject-matter of said action.

And your orator further shows that several other suits were commenced for infringement of said reissued letters patent, and decrees and judgments entered therein fully sustaining their validity.

10 And your orator shows that it is informed and believes, and so states to be true, that the respondent in this action intend- to continue to infringe upon said letters patent, and to unlawfully use said invention as they have already been doing.

And your orator further shows unto your honors, that it will be subject to great and irreparable injury, unless it shall obtain from your honors the relief hereby sought.

That the defendant is utterly insolvent and bankrupt, and a judgment for money against him could not be collected, and hence it is not asked in this case except as to costs.

To the end, therefore, that the said respondent may, upon their corporal oath, full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated and they hereunto distinctly interrogated according to the best of their knowledge, information, and belief, and more especially that they may answer and set forth—

1st. Whether they have not manufactured and used before the filing of this bill, and since the twenty-third day of December, 1876, a large amount of artificial stone pavement within the State of California, and how much; and how the same was constructed?

11 2d. Whether he has not on hand a large amount of, and how much, artificial stone pavement, and how the same is constructed?

And that the said respondent may answer the premises and may be decreed to pay the complainant's costs herein expended.

And your orator further prays that the respondent herein may be restrained by an injunction issuing out of this honorable court from making, using, or vending to others to be used or transferring in any way any concrete or artificial stone pavements within the State of California, embracing the improvements aforesaid so secured to your orator, as aforesaid, and that the pavements so manufactured or purchased or in any manner obtained by them and now in possession of said respondent may be destroyed or delivered up to your orator; and for such other and further relief as the nature of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orator not only a writ of injunction as conformable to the prayar of this bill, but also the writ of subpœna directed to the said Charles A. Molitor, commanding him to appear and answer this bill of complaint, and to do and receive what to your honors shall seem meet.

And your orator will ever pray, &c.

WHEATON & SCRIVNER,
Solicitors for Complainant.

M. H. WHEATON,
Of Counsel for Complainant.

12 STATE OF CALIFORNIA, }
City and County of San Francisco. } *ss:*

Crownson Smith, being duly sworn, on his oath, says: That he is the president of The California Artificial Stone Paving Company, the complainant in the foregoing entitled case; that he has heard the foregoing bill of complaint read and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

CROWSON SMITH.

Subscribed and sworn to before me this ninth day of April, A. D. 1880.

JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court Dist. of Cal'a.

(Endorsed:) Filed April 10, 1880. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

13 *Answer to Bill of Complaint.*

In the Circuit Court of the United States for the Ninth Circuit, within and for the District of California, sitting in Equity.

Charles A. Moliter brings this his reply to the bill of complaint brought against him by the California Artificial Stone Paving Company, alleged to be a corporation existing under the laws of the State of California.

Your orator, for his answer to the said bill of complaint—

Denies that heretofore, to wit, before the nineteenth day of July,

1870, John J. Schillinger, of New York, was the original or first inventor of a certain new or useful invention in concrete pavements, and in this behalf says that before said date said Schillinger made application for a patent of an improvement in concrete pavements; the said alleged improvement was long used by others on similar forms long prior to the year 1870, as your orator is informed and believes.

Denies that the same was a new or useful invention, or that the description set forth on page 1 of bill of complaint herein is either a partial, true, or proper description, and in this behalf alleges that all that the Schillinger improvement in concrete pavements claims to be, as taken from the declaration or specification, signed by John
14 J. Schillinger 15th day of June, 1870, filed in the United States Patent Office, Washington, D. C., and forming part of letters patent No. 105,599, dated July 19, 1870, is, "the arrangement of tar paper or its equivalent between adjoining blocks of concrete," the paper to constitute a tight, water-proof joint, allow the several blocks to heave separately, and be raised or removed separately, without injury to the adjacent blocks; that said Schillinger improvement does not claim as either new or original the laying of concrete pavement, the material being in plastic form, or making the pavement in detached blocks or sections, which harden after being laid, as your orator is advised and believes.

Denies that the same was not known or used by others before the said John J. Schillinger's invention, or at the time of his application for a patent therefor had not been in public use or on sale for two years, nor abandoned.

Denies that John J. Schillinger was the inventor thereof, for the reasons hereinbefore alleged; and

Denies that on the 19th day of July, 1870, said Schillinger obtained letters patent of the United States for any invention other than for the arrangement of tar paper or its equivalent between adjoining blocks of concrete, to constitute by said paper a separation of the blocks, and allow the blocks to be raised or re-
15 moved separately without injury to the adjoining blocks.

Denies that afterwards, on the 7th day of May, 1871, new letters patent were issued to the said John J. Schillinger for any other invention than that issued formerly on or about the 19th day of July, 1870.

Denies that any letters patent secured to the said John J. Schillinger the full or exclusive right or liberty of making or constructing or using, or vending to others to be used, the invention described in bill of complaint herein or any invention other than that of the arrangement of tar paper or its equivalent between adjoining blocks of concrete, as hereinbefore mentioned.

Denies that the respondent herein, having full or any knowledge of the premises, or in violation of complainant's exclusive or any right or liberty or privilege, or utterly or at all disregarding the same or any, have or has since the 23d day of December, 1875, or any time or since the or any assignment to complainant of the said or any reissued letters patent, or before the filing of the bill of com-

plaint herein, without the license of complainant, or any license under said patent, in the said district and State of California, manufactured or used, or still continues to manufacture or use, pavements embracing the improvements or invention described in said reissued letters patent, or so secured to complainant as in his bill set
16 forth.

Denies that respondent, your orator, now replying, has made pavements, or that the pavements made or used by him, that are infringements of said reissued letters patent, or were made according to the invention therein described or thereby protected or secured to complainant contrary to law or the form of the statutes of the United States in such cases made or provided, and in this behalf alleges that respondent, in the month of April, 1877, purchased of J. B. Hurlburt, of Chicago, Illinois, the patent right to manufacure, use, any lay concrete pavements in the city and county of San Francisco and the county of Alameda, according to and by the Hurlburt patent, protected and secured by letters patent No. 162,172, dated April 20, 1875, issued from the United States Patent Office, Washington, D. C., under and by virtue of the statutes of the United States in such cases provided; that your respondent paid in advance the sum of seven hundred and seventy-five dollars ($775) to said J. B. Hurlburt for the right to manufacture, use, and lay concrete pavements, according to Hurlburt letters patent as aforesaid, in the said city and county of San Francisco and county of Alameda, State of California.

17 That the said Hurlburt invention is a novel method of forming blocks of artificial stone or cement pavement, whereby they are prevented from becoming uneven by sinking below or rising above a common plane, and consists in beveling the edges of the blocks so that they will measure more across their under side in one direction and less across their upper side than across their under side in the other or opposite direction; and also consists in the novel construction of a forming frame whereby the blocks are beveled as devised by using the different sides of the frame alternately; and also in the novel construction of a parting strip, whereby the colors are kept separate, showing a straight line between the blocks and while forming their edges in actual contact, the same strip being of great service to rest a straight edge upon while beveling the block in process of formation, and that by said invention the process of laying cement pavements saves from 10 to 15 per cent. in cost of labor over any other known process, entirely dispenses with tar paper or any equivalent and all other expensive superfluities, and makes a close-beveled joint, it being impossible to raise, or attempt to raise, any separate piece of work without chiseling and digging and materially injuring adjacent work.

Alleges that your respondent has performed and does perform all artificial stone work for pavements under said Hurlburt pat-
18 ent process, and that his work is enlirely separate and distinct from Schillinger patent.

Denies that there was involved in or settled by the suit for decision in "The California Artificial Stone Paving Company against

the Oakland Bank of Savings," United States circuit court, ninth circuit, State of California, any matter of the Hurlburt letters patent or work performed thereunder.

Denies that the respondent in this action intends to continue to infringe, or ever has infringed, upon letters patent of complainant, or of which it is assignee, or to unlawfully use said invention, or that they or he, the respondent, already has done, or that he ever did.

And your respondent doth, on oath, herein say and answer: That he has not manufactured or used, before the filing of the bill of complaint in this action, or since the 23d day of December, 1876, a large or any amount of artificial stone pavement within the State of California covered by Schillinger patent, and that the only cement pavement that he has laid, used, or manufactured is that protected and secured by the Hurlburt letters patent hereinbefore mentioned, entirely dispensing with the use of tar paper or its equivalent, making close-beveled joints and one solid pavement that cannot be separated or raised without injury to the adjacent work.

19 Wherefore by reason of the premises your respondent prays that he is hence dismissed this proceeding and bill of complaint herein; that plaintiff be wholly denied all matters solicited therein, and that respondent have his costs, with such other and further relief as may seem meet.

EUGENE N. DEUPREY,
Solicitor for Defendant.
JAMES McM. SHAFTER AND
CHARLES H. PARKER,
Of Counsel.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Charles A. Molitor, being duly sworn, on his oath says that he is the respondent in the foregoing-entitled action; that he has heard the foregoing answer to bill of complaint read and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

C. A. MOLITOR.

Subscribed and sworn to before me, this 3rd day of May, 1880.
JOS. F. O'BEIRNE,
Comm'r of U. S. Circuit Court, Cal.

20 To Messrs. Wheaton and Scrivener, attorneys for plaintiff in the above case:

Take notice that the defendant under the general issue will give in evidence at the trial of this cause the following matter, to wit:

I. That the said Schillinger, the patentee as aforesaid, was not the original and first inventor and discoverer of the said invention and discovery, or of any material and substantial part of the thing, or of the principle and combination patented in and by the letters

patent mentioned in the plaintiff's complaint; but that the same thing, and the same, or substantially the same, principle and combination was known to the persons hereinafter named as early as the —— day of ———, 187—, and prior to the time when it is alleged in this action the same was invented and discovered by said Schillinger, patentee as aforesaid, that is to say, it was known to and in public use by the following-named persons, whose residences are also given, together with the place or places where and the persons by whom the same was used prior to the said supposed invention and discovery, and prior to the application for a patent for the same by plaintiff's said assignor, as stated in the complaint of the plaintiff, viz:

1. N. P. Perine, now residing at Oakland, Alameda county,
21 California, who knew and used the same in New York city, in Greenwich street, and other streets thereof, in 1846, 1847, and after.

Also in Niagara Falls, in New York State, in 1846 and 1848–1854, 1855.

Also in the city of Philadelphia, State of Pennsylvania.

2. George D. Nagle, now residing at said Oakland, who used the same in Philadelphia aforesaid, A. D. 1840.

Also at St. Louis, A. D. 1837, and at Sacramento, California, A. D. 1850.

3. W. C. Clark, now residing at Benicia, who used the same in said Benicia, A. D. 1862–1863, and 1864, at the corner of First and "H" streets, in said Benicia.

Also in Troy, New York State, A. D. 1845, 1846, 1847, and 1848. In Troy, at Second and Ferry and Fifth & Albany streets; also laid pavement for General Wool in 1845 at the corner of 2d and 3d streets, East Troy, State of New York; also the same year saw the same laid for Mrs. Loveland at the corner of Fifth and State streets, in said East Troy.

4. John Ruger, now residing at Benicia, California, who used the same in said Benicia, A. D. 1862, 1863, and 1864, in First and "H" streets thereof.

22 5. Charles A. Molitor, now residing at San Francisco, who used and laid the same at 131 East 86th street, and also at corner of 87th street and Third avenue, about April, 1868. Also immediately after laid said pavement in front of Herman Gunther's residence, 84 4th avenue. Also laid said pavement at the southwest corner of 54th and 5th avenue, in said city of New York city, A. D. 1866, 1868, and 1869.

Also in Jersey City, New Jersey, and Brooklyn, New York, A. D. 1868, 1869, and 1870.

6. Benedict Eberle, now residing at San Francisco, who used said supposed invention in Pittsburg, Pennsylvania, in 1855 and 1856.

7. W. A. Middleton, residence West Oakland, California, who used the same in 1863 and 1864, in West Market street, town of Lima, Allen county, State of Ohio.

Also in 1865, in Elida, Allen county, State of Ohio. Also in 1868 in Bay City, Michigan, in Centre street thereof.

8. D. A. Mulrein, residence San Francisco, who used the same in New York city, on Avenue "C" and Second streets, in 1846.

The use of said invention by the aforesaid eight persons last above named consisted in part in laying and constructing pavements and pathways, floors, and other like work, and otherwise employing the same.

23 9. John M. Snook, residence West Oakland, California, who used the same at the corner of St. Clair and Fremont streets, of the town of Romeo, county of McComb, State of Michigan, A. D. 1866.

The following-named persons, whose residence is at San Francisco, also had knowledge of said supposed invention prior to said invention and discovery, and to said application for patent thereof, and particularly as to the use thereof, and the laying of sidewalks by said W. C. Clark, as above mentioned, to wit, L. B. Mizner, Samuel C. Gray, M. McDonald, E. Danforth, I. A. Bender, F. Barnard, and John Ruger, who each and all reside at Benicia.

That the said invention and discovery and the same principle and combination patented in and by the letters patent mentioned in the plaintiff's complaint was mentioned and described in certain printed publications hereinafter mentioned, printed, published, issued, and publicly circulated and distributed prior to said supposed invention and discovery by said Schillinger of the said invention, discovery, principle, and combination, and before the application for a patent, to wit:

1st. In a printed publication entitled "Encyclopedia of Civil Engineering," by Cressy, the title page whereof is as follows: "An Encyclopedia of Civil Engineering, historical, theoretical, and practical, by Edward Cressy, architect and civil engineer, illus-

24 trated by upward of three thousand engravings in wood, by R. Brouton, new impression, London." That defendant will offer said book in evidence on said trial, and will read from pages 101, 102, and 103, where will be found a substantial and material portion of said invention. Said work is to be found in the San Francisco law library.

2nd. In a printed publication entitled "A Manual of the Principles and Practice of Roadmaking," by W. M. Gillespie, comprising the location, construction, and improvements of roads, common, paved, planked, etc., and railroeds, by W. W. Gillespie. A. M. C. E., Edition, 1847.

Defendant will offer said work in evidence at said trial, and will read from pages 235 & 236 thereof.

3d. In a printed publication entitled "The Penny Cyclopedia" of the society for the diffusion of useful knowledge, in volnme 20 thereof, printed A. D. 1833, in London, Great Britain. Defendant will offer in evidence said book on said trial, and read from page 33 thereof.

4th. In a printed publication entitled "English Encyclopedia," the title page of which is as follows:

"Dedicated by permission to Her Majesty, Arts and Sciences, or

Fourth Division of the English Encyclopedia, conducted by Chas. Knight, vols. 7 and 8." That I shall offer said books in
25 evidence on the said trial, and read from page 135, where will be found a description of the substantial and material portion of said invention. Said work is to be found in the San Francisco law library, Montgomery Block.

5th. In the six printed publications next hereinafter mentioned, which publications are not paged, but purport to contain in print the grant of patents made by the English Government, each of said publications is entitled "Specifications of Patents."

(1.) Patent granted to Benjamin Macneith, May 6th, 1828. No. 5652, volume 153.

(2.) Patent granted to Robert Hendley, July 30th, 1838. No. 7853, volume 274.

(3.) Patent granted to Jean August Lebrun, October 30th, 1852. No. 580, new series, vol. 21.

(4.) Patent granted to Toppin Eldridge, November 25th, 1837. No. 7486, in volume 259.

(5.) Patent granted to J. L. Lillie, April 28th, 1853. No. 1034, new series, volume 33.

(6.) Patent granted to William Bucknell, June 22nd, 1859. No. 1498, new series, volume 41.

Defendant will put in evidence each of said six last-named publications, and read from the patents so numbered each and all thereof. Said six printed publications, last above-mentioned are part of
26 a series of publications, the first volume whereof is entitled as follows: "Specifications of Patents," London, printed by Geo. Edward Eyre and William Spottswood, printed to the Queen's most Excellent Majesty, 1857.

You will further take notice, that on said trial defendant will prove that the supposed invention mentioned in plaintiff's complaint had been patented and described as to the material and substantial parts thereof in two certain patents granted by the Government of the United States, and that the names of the patentees therein, and the dates of the patents, and when granted, are as follows:

1. Patent granted to C. S. Reinhold, patent number 46975, dated March 21st, 1865.

2. Patent granted to H. P. Russ, patent number 5475, dated March 28th, 1848, granted March 28th, 1848.

(Endorsed:) Service of a copy of the within answer admitted this 19th day of May, A. D. 1880. Wheaton & Scrivner, att'ys for compl't. Filed 19th May, 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y clerk.

27 *The Replication of The Cal. Artificial Stone Paving Co., Complainant, to the Answer of Charles A. Molitor, Defendant.*

Circuit Court of the United States for the District of California, Ninth Judicial Circuit.

THE CAL. ARTIFICIAL STONE PAVING CO., Complainant,
vs.
CHARLES A. MOLITOR, Defendant.

The repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, saith: That he will aver, maintain, and prove said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by the repliant; that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true.

28 All of which matters and things the repliant does now and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by the said bill he has already prayed.

WHEATON & SCRIVNER,
Solicitors for Complainant.

(Endorsed:) Service of the within replication and receipt of a copy thereof admitted this 20th day of May, 1880. Eugene N. Deuprey, attorney for defendant. Filed 20th day of May, A. D. 1880. L. L. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

29 *Final Decree.*

In the United States Circuit Court, Ninth Circuit, District of California.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Complainant,
vs.
CHARLES A. MOLITOR, Defendant.

This cause having come on to be heard upon the bill of complaint herein, the answer of the said defendant, Charles A. Molitor, the replication of the complainant to such answer, and the proof, oral, documentary, and written, taken and filed in said cause, and having been argued by counsel for the respective parties:

Now, therefore, on consideration thereof, it is ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree as follows, viz:

That the reissued letters patent No. 4364 granted and issued on the 2d day of May, A. D. 1871, to John J. Schillinger, of New York, being the patent referred to in the bill of complaint herein, are good and valid in law.

That the said John J. Schillinger was the first and original
30 inventor and discoverer of an improvement in concrete cement pavements, as described and claimed in said reissued letters patent and the specifications annexed thereto, and that the complainant herein is the exclusive owner thereof, by assignment from said John J. Schillinger, within and for the State of California. That the said defendant, Charles A. Molitor, has infringed said reissued letters patent, and upon the exclusive rights of the complainant under the same, that is to say, by making or selling one or more artificial concrete cement pavements within the State of California, and while the complainant was the owner of said reissued letters patent, as charged in said bill of complaint.

The complainant herein having in its bill of complaint expressly waived any judgment for damages or profits, and only asked for an injunction and costs, it is therefore ordered, adjudged, and decreed that the said complainant do recover of the defendant his costs and charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the said defendant, Charles A. Molitor, restraining him, his agents, clerks, servants, and all claiming or holding under or through him, from making, selling, or
31 using, or in any manner disposing of any artificial stone-block pavements embracing the invention and improvements described in the said reissued letters patent, pursuant to the prayer of the said bill of complaint.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Filed and entered September 10, 1881. L. S. B. Sawyer, clerk.

32 *Order to Show Cause.*

In the United States Circuit Court, Ninth Circuit, District of California.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Complainant,
vs.
CHARLES A. MOLITOR, Defendant.

Upon reading and filing the affidavits of George Goodman, Henry C. Hansen, and John O'Brien, alleging that said defendant, Charles A. Molitor, has been guilty of a contempt of this court, in disobeying the decree entered heretofore in the above cause, as seth forth in said affidavits, it is hereby ordered, and this court does command said Charles A. Molitor, that he appear before our court, at
33 the court-room thereof, in the New Appraiser's Building, situate at the N. E. corner of Washington and Sansome streets, in the city and county of San Francisco, State of California, on Monday, the 29th day of October, 1883, at the hour of 11 o'clock, a. m., and then and there show cause, if any he have, why he should not be punished for a contempt of court in disobeying the decree of this court heretofore entered in the above-entitled cause.

It is further ordered that a copy of this order, together with a copy of each of the affidavits of said George Goodman, Henry C. Hansen, and John O'Brien, be served upon said Charles A. Molitor on or before October 25th, 1883.

34 (Signed) SAWYER,
Circuit Judge.

Endorsed: Filed October 26, 1883. L. S. B. Sawyer, clerk.

35 *Decree or Judgment.*

At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Friday, the 24th day of October, in the year of our Lord one thousand eight hundred and eighty-four:

Present: The Honorable Lorenzo Sawyer, circuit judge; the Honorable Geo. M. Sabin, U. S. district judge of Nevada.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY
vs.
CHARLES A. MOLITOR. } No. 2284.

The order to show cause why the defendant in this case should not be punished for contempt for violating the injunction issued herein by the construction of a pavement for William Wahl at Redwood city coming on to be heard, and the court having fully considered the matters in issue, and the judges being opposed in opinion as to whether the said pavement constructed by defendant in the manner stated in the certificate of opposition in opinion filed
36 herein is an infringement of the complainant's patent, and whether such construction of said pavement constitutes a violation of said injunction and a contempt of court, and a decree having been ordered to be entered in pursuance of the opinion of the presiding judge, as provided by law, now, therefore:

It is ordered, adjudged, and decreed that the said pavement constructed by defendant in the manner set out in the certificate of opposition of opinion herein does not infringe the complainant's patent, and that the construction of said pavement does not constitute a violation of said injunction; and it is further adjudged and decreed that defendant is not in contempt, and that said order to show cause be, and the same is hereby, discharged with costs.

SAWYER,
Presiding Judge.

(Endorsed:) Filed and entered Oct. 24, 1884. L. S. B. Sawyer, clerk.

37 *Certificate of Opposition of Opinion.*

At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit,

in and for the district of California, held at the court room in the city and county of San Francisco, on Friday, the 24th day of October, in the year of our Lord one thousand eight hundred and eighty-four:

Present: The Honorable Lorenzo Sawyer, circuit judge, the Honorable George M. Sabin, district judge.

CALIFORNIA ARTIFICIAL STONE PAVING COMPANY
vs.
MOLITOR. } No. 2284.

The record and facts upon which this matter was heard, and out of which the questions upon which the opinions of the judges were opposed are as follows:

The bill in equity filed in the case, the answer of the defendant, and the replication of complainant, a final decree awarding a perpetual injunction, an injunction issued thereon, and an order
38 to show cause why the defendant Molitor should not be punished for violating said injunction, copies of all which papers and of the order of the court adjudging defendant not to be in contempt and discharging said order to show cause, are ordered to be certified by the clerk and annexed to this certificate as a part thereof, and a part of the record of the case on certificate of opposition in opinion.

Upon the hearing of said order to show cause the following facts satisfactorily appeared to the court from the evidence in the case, and the report of the master to whom the matter was referred. The specifications and drawings of said patent in question and forming a part thereof adjudged to be valid, and from the infringment of which the defendant was perpetually enjoined, are in the words and figures following, to wit:

39 *Patent.*

UNITED STATES PATENT OFFICE.

JOHN J. SHILLINGER, of New York, N. Y.

Specifications Forming Part of Letters Patent No. 105599. Dated July 19, 1870. Reissue No. 4364, dated May 2, 1871.

Improvement in Concrete Pavements.

[The schedule referred to in these letters patent and making part of the same.]

To all whom it may concern:

Be it known that I, John J. Schillinger, of the city, county, and State of New York, have invented a new and useful improvement in concrete pavement, and I do hereby declare the following to be a full, clear, and exact description thereof, which will enable those skilled in the art to make and use the same, reference being had to the accompanying drawing forming part of this specification, in which drawing—

Figure 1 represents a plan of my pavement.

Figure 2 is a vertical section of the same.

Similar letters indicate corresponding parts.

This invention relates to a concrete pavement which is laid in sections so that each section can be taken up and relaid without
40 disturbing the adjoining sections.

With the joints of this sectional concrete pavement are combined strips of tar-paper or equivalent material arranged between the several block or sections in such a manner as to produce a suitable tight joint, and yet allow the blocks to be raised separately without affecting the blocks adjacent thereto.

In carrying out my invention I form the concrete by mixing cement with sand and gravel, or other suitable material, to form a plastic compound, using about the following proportions:

One part by measure of cement, one part by measure of sand, and from three to six parts by measure of gravel, with sufficient water to render the mixture plastic; but I do not confine myself to any definite proportions or materials for making the concrete composition.

While the mass is plastic I lay or spread the same on the foundation or bed of the pavement, either in molds or between moveable joints of the proper thickness, so as to form the edges of the concrete blocks *a a*, one block being formed after the other.

When the first block has set, I remove the joists or partitions between it and the block next to be formed, and then I form the second block, and so on, each succeeding block being formed after the adjacent blocks have set. [Disclaimed: And since the concrete
41 in setting shrinks, the second block, when set, does not adhere to the first, and so on,] and when the pavement is completed each block can be taken up indepen't of the adjoining blocks.

Between the joints of the adjacent blocks are placed strips of tar-paper, or other suitable material, in the following manner:

After completing one block, *a*, I place the tar-paper *b* along the edge where the next block is to be formed, and I put the plastic composition for such next block up against the tar-paper joint, and proceed with the formation of the new block until it is completed. In this manner I proceed until the pavement is completed, interposing tar-paper between the several joints as described.

The paper constitutes a tight water-proof joint, but it allows the several blocks to heave separately from the effects of frost, or to be raised or removed separately, whenever occasion may require, without injury to the adjacent blocks.

The paper when placed against the block first formed, does not adhere thereto, and therefore the joints are always free between the several blocks, although the paper may adhere to the edges of the block or blocks formed, after the same has been set up in its place between the joints.

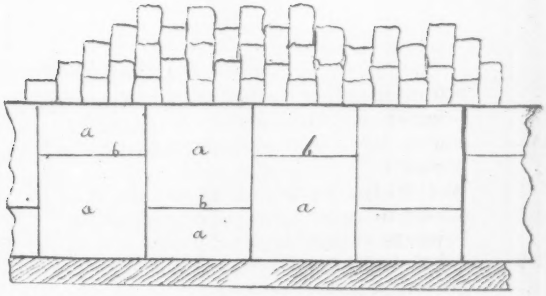
[Disclaimed: In such cases, however, where cheapness is an object, the tar-paper may be omitted, and the blocks formed without interposing anything between their joints as previously
42 described. In this latter case the joints soon fill up with

JOHN J. SCHILLINGER.

Improvement in Concrete-Pavements.

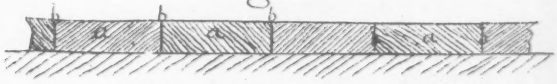
No. 4364 Reissued May 2. 1871.

Fig: 1.



Nos 1213 & 1214.
Cal. Artificial Stone
Paving Company
vs.
Molitor
p. 42.

Fig: 2.



Witnesses:
E. F. Haslenhuber
C. Wahlers.

INVENTOR.
John J. Schillinger

sand or dust, and the pavement is rendered sufficiently tight for many purposes, while the blocks are detached from each other, and can be taken up and relaid each independent of the adjoining blocks.]

What I claim as new and desire to secure by letters patent is—

1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.

2. The arrangement of tar-paper or its equivalent, between adjoining blocks of concrete, substantially as and for the purpose set forth.

JOHN J. SCHILLINGER.

Witnesses—
W. HAUF,
E. F. KASTENHUBER.

[Here follows diagram, marked p. 42.]

43 As to the passages and parts of said patent included in red lines [red lines in copy are marked with brackets as above.—PR.] in the foregoing copy the patentee had in due form of law filed a disclaimer in the office of the Commissioner of Patents, at Washington. Since the entering of said final decree and the service of the injunction in said decree made perpetual, and before the issue of said order to show cause, defendant Molitor had constructed a concrete pavement, laid in sections, at Redwood City, in the county of San Mateo, for one William Wall, in substantially the following manner: He curbed or bulkheaded the end of the sidewalk where he began, and laid a moveable joist or scantling about two feet from the curb or bulkhead, at the beginning of the sidewalk, extending from the house to the curbstone of the street, the distance from the house to the curbstone being about 12 feet. He then filled in the space between the bulkhead or curb and the scantling with plastic material compound of coarse gravel and cement, to the depth of between three and four inches; and then tamped it down solid with an iron tamper or rammer. He then put on over this a course from a half to three-fourths of an inch thick of finer material, being mostly cement, for a surface. He then with a float, a species
44 of trowel, or some kind of implement made for the purpose, floated and smoothed over the surface, while yet in a soft or plastic condition, so as to leave it when hardened with a smooth, polished surface. The block thus made is about 2 feet wide by 12 feet long. After being thus polished and finished on the surface, and after the cement was partially set and partially hardened, but before it had become solidified into stone, the respondent laid a straight-edge across the large block at regular distances of about two feet, and in some instances ran the point and edge of the trowel along the straight-edge, cutting slightly into the surface, making a mark or shallow cut in the material along the line of the straight-edge, but in some instances, at least, cutting to the depth of half an inch to an inch and nearly or quite through the surface course, in the others not so deep, only making a shallow cut or line. He then run a marker, consisting of a small parallelogram of smooth sheet steel,

like the blade of a trowel, about 2½ by 3½ inches, beveled upwards from the center on the under side, which beveling will nearly or quite double the extreme depth from the general surface, with a thin, slightly-rounded lip or rib running along the center from end to end, projecting from the blade one-sixteenth of an inch, the instrument having a handle by which to work it. This
45 made a depression in the surface along the cut or line drawn by the trowel to the depth at least of one-sixteenth of an inch in addition to the depth of the depression created by the beveling, by which the surface was divided into squares, giving the sidewalk the appearance of having been laid in separate blocks like the pavement constructed under the Schillinger patent. Sometimes, also, the blocks were marked off with this marker alone, without cutting with the trowel, by running it along a line or mark made with a snap line, such as is used by carpenters to mark lines, and following this line so made with the marker, the marker cutting to the depth of one-sixteenth of an inch, in addition to the slight depth made by the bevels on the face of the instrument. The large block was thus divided on the surface by these cross-cuttings and markings into six equal squares, giving that part of the sidewalk the appearance on the surface of having so many separate blocks or squares.

When this block was finished, the scantling was moved along far enough to make a second similar block across the sidewalk, which was constructed and marked off into squares in the same way, the new block abutting against the first block formed on that side, and the marker was run along the line between the two blocks, dis-
46 tinctly marking that line in the same manner as the cross-lines are marked; and thus the process was repeated until the sidewalk was completed.

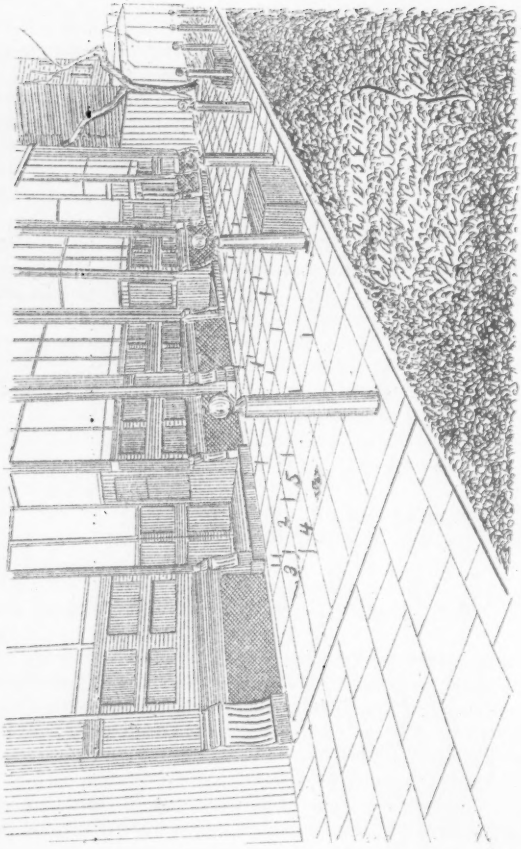
The effect both of the cutting and marking, and the effect of teh marking alone with the marker without cutting with a trowel, as herein described, is—

1. To give the sidewalk the appearance of having been laid out in separate blocks, like the pavement made under the Schillinger patent.

2. It prevents the blocks from cracking, whether from shrinkage, heaving from frost, the application of force, or from other causes, an effect or result first obtained by Schillinger's invention, large blocks being extremely liable and almost certain to crack irregularly, and thereby render them unsightly and far more liable to destruction, or to become dilapidated to such a degree as to render them impracticable, or at least less practicable and less useful.

Prior to Schillinger's invention, concrete pavements had been laid in solid sheets, but had never been divided into blocks during the process of formation, while the pavement was being laid in its place upon the ground and the material yet in a plastic condition.
47 Prior to Schillinger's patent, concrete pavements were but little used; since his patent they have gone into very general and extensive use in the forms already described herein.

In the case of the pavement in question, the cutting and marking or the marking alone, as described, controls the cracking, so that



the cracking or breaking is along the line of the cutting and marking, or the line of marking alone, the block itself not cracking. By reason of this cracking or breaking along the line of cutting and marking, or line of marking upon shrinking, or the application of force or otherwise, the pavement remains generally in good condition and in a far better and more lasting pavement than one laid in large blocks not so marked off or divided. The blocks, also, can be more or less readily taken out for repairs, or for other purposes, without materially injuring the whole sidewalk, or adjoining blocks; and the blocks do not crack or break into fragments, or so as to materially injure the sidewalk—the deeper the cutting, the more readily and largely will be the advantages obtained. The top course of half an inch, more or less, in thickness contains a much larger amount of cement and better material than the coarsest material below, and, consequently, is comparatively much stronger, a relatively much larger portion of the strength being in that course,
48 and a line or mark on the surface is much more effective than a similar one at the bottom would be. While the blocks laid in strict accordance with the specifications in the Schillinger patent can be more readily taken up, still the cutting and marking, or the mere marking of the surface with the marker alone, as described, affords, to a very large extent, the advantages mentioned obtained by the use of the Schillinger patent, the additional cutting with the trowel, during the process of formation, to a greater or less extent, increasing those advantages. The Exhibit C, offered as follows, is a photograph of the sidewalk as laid by defendant Molitor, claimed to be an infringement of the patent in question.

EXHIBIT C.

[Here follows photograph, marked page 48.]

(Endorsed:) Filed February 29, 1884. L. S. B. Sawyer, clerk. By F. D. Moncton, deputy clerk.

49 The black perpendicular stripes in the photograph of the sidewalk are photographs of strips of tin, set up on end in the marks or seams cut, and they had no other support than the cut and the edges of the opposite squares made by the cutting or marking, in the manner hereinbefore stated. These were inserted mostly to the depth of two-sixteenths to three-sixteenths of an inch, and some to the depth of an inch. There were some, though, so far as shown, not many cuts to the depth of an inch.

At the hearing of said order to show cause, at the present term of the court, upon said record, and upon the facts hereinbefore stated, there occurred as questions arising thereon—

1. Whether the laying of said concrete pavement of plastic material on the ground in the manner stated, and dividing it into smaller blocks upon the surface by cutting across the surface of the larger blocks with a trowel, and afterward running the marker along the line of the cutting with the trowel, in all respects as hereinbefore stated, constitutes an infringement of the patent to Schillinger set out in this certificate?

2. Whether the laying of the said concrete pavement of
50 plastic material on the ground in the manner stated, and dividing it into smaller blocks upon the surface, by cutting across the surface of the larger blocks by running the marker, without any other cutting with a trowel or other instrument than the marker described, across the blocks, on a line previously marked, as a guide, in all respects in the manner as hereinbefore stated, thereby controlling the line of cracking, and obtaining in a greater or less degree the advantages pertaining and belonging to the pavements laid in all respects in accordance with the specifications of said Schillinger patent, constitutes an infringement of said patent?

3. Whether the defendant Molitor, by constructing the said pavement in all respects in the manner hereinbefore stated, is guilty of violating the injunction granted and made perpetual by the decree in this case?

Upon which said several questions and upon each of them the opinion of the judges were opposed.

Wherefore, on motion of M. A. Wheaton, Esq., on behalf of said complainant, that the several points upon which the disagreement has happened may, during the term, be stated under the direction of the judges, and certified, under the seal of the court, to
51 the Supreme Court of the United States, to be finally decided, it is ordered that the foregoing statement of the record, and facts upon which the case was heard and decided, and of the facts which are made under the direction of the judges, be entered of record and certified accordingly, at the request of its said counsel, and in pursuance of the statute in such case made and provided.

(Signed) LORENZO SAWYER,
Circuit Judge.

Do. GEO. M. SABIN,
Dist. Judge Dist. of Nevada.

(Endorsed): Filed and entered October 24, 1884. L. S. B. Sawyer, clerk.

52 *Order allowing Appeal.*

At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room in the city and county of San Francisco, on Friday, the 24th day of October, in the year of our Lord one thousand eight hundred and eighty-four:

Present: The Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, U. S. district judge of Nevada.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY
vs.
CHARLES A. MOLITOR. } No. 2284.

On motion of M. A. Wheaton, Esq., solicitor for complainant, and for the order to show cause why said Charles A. Molitor, defendant

herein, should not be punished for a contempt of court, it is
53 ordered that an appeal from the decree filed and entered in the above-entitled cause on the 24th day of October, A. D. 1884, to the Supreme Court of the United States, be and the same is hereby allowed, and that a certified copy of the bill of complaint, answer, replication, final decree, order to show cause, decree and certificate of opposition of opinion, be forthwith transmitted to the Supreme Court of the United States, upon the appellant giving a bond in the sum of five hundred dollars.

54 *Bond on Appeal.*

In the Supreme Court of the United States.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Appellant,
vs.
CHARLES A. MOLITOR, Appellee.

Know all men by these presents, that we, George Goodman and L. F. Reichling, are held and firmly bound unto Charles A. Molitor, the above-named appellee, in the sum of five hundred dollars, gold coin of the United States of America, to be paid to said Charles A. Molitor, his heirs, executors, or administrators; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

In witness whereof, we have hereunto set our hands and
55 affixed our seals, this 29 day of October, 1884.

The condition of this obligation is such that whereas the above-named The California Artificial Stone Paving Company has taken an appeal to the Supreme Court of the United States to reverse the decree rendered by the circuit court of the United States of America of the ninth judicial circuit in and for the district of California in the cause entitled The California Artificial Stone Paving Company against Charles A. Molitor (No. 2284), which said decree was filed and entered of record in said circuit court on the twenty-fourth day of October, A. D. 1884:

Now, therefore, if the above-named The California Artificial Stone Paving Company shall prosecute its said appeal to effect and answer all costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

GEORGE GOODMAN. [SEAL.]
L. F. REICHLING. [SEAL.]

Signed, sealed, and delivered in presence of—
L. S. B. SAWYER.

56 UNITED STATES OF AMERICA, }
District of California, } *ss:*

George Goodman and L. F. Reichling, being duly sworn, each for himself says: That he is a householder within the district aforesaid, and that he is worth the sum of five hundred dollars in gold coin of

the United States of America, exclusive of property exempt from execution, and over and above all his just debts and liabilities.

GEORGE GOODMAN.
L. F. REICHLING.

Subscribed and sworn to before me, this 29th day of October, 1884.

L. S. B. SAWYER,
Com'r U. S. Circuit Court, Dist. Cal.

(Endorsed:) The form of the within bond and the sufficiency of the sureties therein are hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge, 9th judicial circuit. Filed Oct'r 29th, 1884. L. S. B. Sawyer, clerk.

57 *Bond on Writ of Error.*

In the Supreme Court of the United States.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY, Plaintiff in Error,

vs.

CHARLES A. MOLITOR, Defendant in Error.

Know all men by these presents, That we, George Goodman and L. F. Reichling, are held and firmly bound unto Charles A. Molitor, the above-named defendant in error, in the sum of five hundred dollars, gold coin of the United States of America, to be paid to the said Charles A. Molitor, his heirs, executors, or administrators, to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals; dated this 29th day of October, 1884.

58 Whereas the above named, The California Artificial Stone Paving Company, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, on the twenty-fourth day of October, A. D. 1884, in the cause entitled The California Artificial Stone Paving Company against Charles A. Molitor (No. 2284):

Now, therefore, the condition of this obligation is such, that if the above-named, The California Artificial Stone Paving Company, plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

GEORGE GOODMAN. [SEAL.]
L. F. REICHLING. [SEAL.]

Signed, sealed, and delivered in presence of—

L. S. B. SAWYER.

59 UNITED STATES OF AMERICA, } ss:
District of California, }

George Goodman and L. F. Reichling, being duly sworn, each for himself deposes and says: That he is a householder in said district and is worth the sum of five hundred dollars, gold coin of the United States of America, exclusive of property exempt from execution and over and above all debts and liabilities.

GEORGE GOODMAN.
L. F. REICHLING.

Subscribed and sworn to before me, this 29th day of October, 1884.

L. S. B. SAWYER,
Com'r U. S. Circuit Court, Dist. Cal.

(Endorsed:) The form of the within bond and the sufficiency of the sureties thereon are hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge, 9th circuit. Filed Oct. 29th, 1884. L. S. B. Sawyer, clerk.

60 In the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of California.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY
vs.
CHARLES A. MOLITOR.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing fifty-six written pages, numbered from 1 to 56, to be a full, true, and correct copy of the bill of complaint, answer, replication, final decree, order to show cause, decree or judgment, and certificate of opposition of opinion, in the above and therein-entitled cause, and that the same together constitute the transcript on appeal or writ of error to the Supreme Court of the United States in said cause.

61 Attest my hand and the seal of said circuit court, this 31st day of October, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk.*

62 UNITED STATES OF AMERICA, *ss:*

To Charles A. Molitor, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the twenty-first day of November, A. D. 1884, pursuant to an order allowing an appeal from the decree of the circuit court of the United States for the district of California, filed and entered October 24th, A. D. 1884, in the cause wherein The California Artificial Stone Paving Company is appellant and you are appellee in error, to show cause, if any there be, why the decree in the said order mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 29th day of October, A. D. 1884, and of the Independence of the United States the one hundred and ninth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

63 [Endorsed:] No. 2284. In the Supreme Court of the United States. The California Artificial Stone Paving Company, appellant, *vs.* Charles A. Molitor, appellee. Citation. Service of a copy of the within citation is hereby acknowledged this 29th day of October, 1884. John L. Boone, solicitor for appellee.

[Endorsed across the face in red ink:] Filed October 29, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the California Artificial Stone Paving Co., plaintiff in error, and Charles A. Molitor, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the twenty-first day of November, 1884, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 29th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[SEAL.] L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the District of California.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

65 *The Answer of the Judges of the Circuit Court of the United States for the District of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] L. S. B. SAWYER, *Clerk.*

[Endorsed:] No. 2284. United States Supreme Court. The California Artificial Stone Paving Company, pl'ff in error, *vs.* Charles A. Molitor, def't in error. Writ of error. Service of a copy of the within writ of error is hereby acknowledged this 29th day of October, 1884. John L. Boone, solicitor for appellee.

[Endorsed across the face in red ink:] Filed October 29, 1884. L. S. B. Sawyer, clerk. By F. D. Moncton, deputy clerk.

66 UNITED STATES OF AMERICA, *ss:*

To Charles A. Molitor, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 21st day of November, A. D. 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein The California Artificial Stone Paving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 29th day of October, A. D. 1884, and of the Independence of the United States the one hundred and ninth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

67 [Endorsed:] No. 2284. In the Supreme Court of the United States. The California Artificial Stone Paving Company, pl'ff in error, *vs.* Charles A. Molitor, def't in error. Citation. Service of a copy of the within citation is hereby acknowledged, this 29th day of October, 1884. John L. Boone, att'y for def't in error. [Endorsed across the face in red ink:] Filed October 29, 1884. L. S. B. Sawyer, clerk. F. D. Moncton, deputy clerk.

Endorsed on cover: California C. C. U. S. No. 1213. The California Artificial Stone Paving Company, appellant, *vs.* Charles A. Molitor. No. 1214. The California Artificial Stone Paving Company, plaintiff in error, *vs.* Charles A. Molitor. Filed 15th November, 1884.

113-609

Office Supreme Court U. S.
FILED
NOV 24 1884
JAMES H. McKENNEY,
CLERK.

No. .....

In the Supreme Court

—OF THE—

UNITED STATES.

The Cal. Artificial Stone Paving Co.

Plaintiff in Error.

vs

CHARLES A. MOLITOR,

Defendant in Error.

Plaintiff's Brief.

M. A. WHETON,
Of Counsel for Plaintiff in Error.

Filed this ..... *day of* ..... *A. D. 1884.*

..... *Clerk.*

By ..... *Dep. Clerk.*

U. S. SUPREME COURT.

THE CALIFORNIA ARTIFICIAL STONE PAVING COMPANY,
Plaintiff in Error.

vs.

CHARLES A. MOLITOR,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

This cause comes to this Court on a certificate of division of opinion of the judges of the Circuit Court of the Ninth Circuit for the District of California.

Lest a possible mistake might be made as to whether the cause should be brought here by appeal, or by writ of error, it is brought in both ways. The plaintiff in error is also an appellant and the defendant in error is also an appellee. There is however but one record to examine as there was but one certificate of division of opinion made. The writ of error is probably the proper process to use in bringing the case to this Court. The proceedings to punish for contempt is a criminal proceeding although the

action was in equity in which the decree and injunction were entered for the violation of which the defendant was alleged to be in contempt.

New Orleans *vs.* Steamship Company, 20 Wallace on page 392.

Ex. Parte Kearney, 7 Wheaton 41 to 46.

Being a criminal proceeding and the Judges of the Circuit Court being divided in opinion upon a question of law it was proper to bring the case to this Court and have the question of law, upon which the judges were divided, decided by this Court. The certificate of the division of opinion being of course the original basis that authorized the bringing of the cause to this Court.

Section 651, Revised Statutes.

New Orleans *vs.* Steamship Company, 20 Wallace page 392.

A final judgment was entered upon the prevailing opinion of the Circuit Judge as required by law.

Section 650, Revised Statutes.

In this case the facts are all found. There was no disagreement between the judges upon any questions of fact. The question is whether the acts done by the defendant about which there is no controversy constituted an infringe-

ment of the patent which he was enjoined from infringing. This question depends upon what construction should be given to the patent. *The construction of a patent is always a question of law*, especially when all the *res gestre*, or surrounding circumstances, which in patent cases are commonly denominated the state of the art, are established.

Walker on Patents, section 189.

Winans *vs.* Denmead, 15 Howard, 330, page 338.

The original action was in equity, and, after a full trial, a final decree was entered, enjoining the defendant from infringing the Letters Patent upon which the action was based, viz :

Re-issued Letters Patent, No. 4,364, bearing date May 2d, A. D. 1871, and granted to John J. Schillinger, the complainant's assignor, for an " Improvement in Concrete Pavements."

The patent has been often tested and sustained in Court, and has also been construed, and the question as to what constitued an infringement of it has often been decided.

Schillinger *vs.* Gunther, 2 Banning & Arden's Patent cases, 544.

Schillinger *vs.* Gunther, 3 Ibid., 491.

Schillinger *vs.* Gunther, 4 Ibid., 479.

California Artificial Stone Paving Co. *vs.* Perine, and same *vs.* Molitor, 7 Sawyer's Reports, 190.

Same *vs.* Freeborn, 8 Sawyer, 443.

Kuhl *vs.* Mueller, 21 Federal Reporter, 510.

Schillinger *vs.* Greenway Brewing Co., 17 Federal Reporter, 244.

No question concerning the validity of the patent arises here. Its validity was adjudged in the original decree entered in this case. From that decree no appeal was ever taken, and it remains in full force and effect as a final determination of the rights of the parties hereto. The time in which the decree could be disturbed by appeal or otherwise has long since passed, and it is now fixed for all time, and is forever unassailable.

The patent in this case described a pavement made of concrete, which is a well known substance, formed by mixing cement, sand or gravel and water and allowing the compound to "set" or turn into an artificial but very hard stone. While the mass is plastic it is laid on the ground, either in molds or between joists, so as to form it into blocks. After the first block is set, the molds or joists are removed and the next block is formed, and so on; each succeeding block being formed

after the adjacent blocks have set. Strips of tar-paper are interposed between the blocks and form a water-tight joint between them.

The claims of the patent call for

"1. A concrete pavement laid in detached "blocks or sections, substantially in the manner "shown and described.

"2. The arrangement of tar-paper or its "equivalent between adjoining blocks of concrete, "substantially as and for the purpose set forth."

When taking out his patent Schillinger supposed that if one block of concrete was laid up against those already completed and set, that they would not adhere but would shrink and leave an open joint. He made a statement of this kind in his original specifications. In this he was mistaken, as subsequent events proved that the blocks so laid together would *adhere*, and the result would be a pavement in one continuous sheet of stone, and not a block pavement at all.

The history of the disclaimer and reasons for it are given in the decision of His Honor, Judge Blatchford, in the case of Schillinger *vs.* Gunther, filed August 26th, 1879, 4 Banning & Arden, pages 483 and 484, in the following language, viz :

"I have arrived at the conclusion, on the evi-"dence, that the disclaimed parts, both of the "body of the reissued specification and of the "first claim thereof, were introduced by reason

" of a mistaken idea on the part of the plaintiff,
" that the concrete, in setting would shrink, so
" that the second block when set would not,
" though setting in contact with the first set block,
" adhere to such first set block, and that it was
" not necessary, in forming the blocks from the
" plastic material, to interpose anything between
" their joints, in the process of formation, in order
" to produce the detached blocks or sections de-
" scribed in the specification. I am also of
" opinion, on the evidence, that there was no
" willful default, or fraudulent or deceptive inten-
" tion, or intent to defraud or mislead the public,
" on the part of the plaintiff. The evidence
" shows that the plaintiff believed, when he took
" the reissue, that a sectional pavement could be
" made of plastic concretes, without interposing
" anything between the blocks. He may not
" have experimented as much as he ought to have
" done before arriving at that conclusion. He
" may have arrived at it on insufficient and
" inadequate grounds. Still, if he acted in good
" faith it was a mistake. If he made experi-
" ments and drew a conclusion from them not
" wholly baseless, it was not a willful default,
" although other persons may from other inform-
" ation have been of a different opinion, and al-
" though other persons would have been slow to
" draw the same conclusion the plaintiff did from

" the premises before him. So, too, although the " experiments and the conclusion were made and " arrived at after the original patent was taken " out, in such wise as to destroy the validity of " the re-issue so far as such conclusion was con- " cerned, it was proper to make the disclaimer in " question in order to avoid the effect of inserting " in the re-issue matter, which amounted, if true, " to an invention made after the granting of the " original patent. The plaintiff states, in his " affidavit made November 22d, 1878, that he " has never known any cement pavement con- " structed in sections formed on the ground for " actual use in outdoor work, without the inter- " position of something while the material was in " a plastic state to form or complete the joints. " There is nothing in this that is inconsistent " with his statement in the same affidavit that he " believed when he took his re-issue, that the " concrete in setting would shrink, and that, after " one section had been formed, another section " might be formed of the plastic material directly " against and in contact with the one already " formed, and the blocks when completed would " be detached; nor anything inconsistent with " the fair result of the evidence.

" The experiments on which he rested his " belief were not pavements in sections formed " on the ground for actual use in out-door work.

"As to the conversations with the plaintiff, "testified to by witnesses, they are too vague "and unreliable to be satisfactory. The fact "that the plaintiff, in the fall of 1874, laid, in "Washington, from 2,000 to 3,000 square feet "of concrete pavement in sections, without "anything being interposed between the blocks, "with the intention that it should be a pavement "of detached blocks, such as his specification "describes, shows that he had not at that time "abandoned the idea that a pavement of detached "blocks could be made in that way. It was not "till January, 1875, that it clearly appeared that "such pavement was a pavement of adhering "blocks, and not a pavement of detached blocks."

"The foregoing observations serve to show "that there was no unreasonable neglect or de- "lay in not filing until March 1st, 1875, the dis- "claimer in question."

The following is from the decision of Judge Shipman in the same case, wherein he convicted the defendant of contempt :

2 Banning & Arden, last half page 549.

"The plaintiff supposed that his invention in- "cluded a block pavement in which the blocks "were formed either with or without the interpo- "sition of something between the joints. He "subsequently ascertained that he was mistaken,

"and that the pavement was not divided into "blocks without the interposition of some ma- "terial to form joints. The discovery of this "fact led to his disclaimer, wherein he disclaimed "the forming of blocks from plastic material "without interposing anything between the "joints. This disclaimer left the patent for a "pavement wherein the blocks were formed by "the interposition of some separating material "between the joints, and in the specification he "has described tar-paper or its equivalent."

I have thus explained the disclaimer, in order to give it its proper position in the case, and prevent its inadvertently assuming a wrong position.

The facts stated in the certificate of division, taken in connection with the specifications of the patent, show the following, viz :

That prior to Schillinger's invention, concrete pavements had been laid in solid sheets, but had never been divided into blocks during the process of formation while the pavement was being laid upon the ground and the material yet in a plastic condition.

Prior to Schillinger's patent, concrete pavements were but little used. Since his patent, however, they have gone into very general and extensive use in the forms described in the certificate of division, which forms are those used by the complainant and the defendant in the case,

and consist of laying the concrete in a plastic form on the ground, which is to be the foundation of the pavement, and dividing the pavement into blocks as it is being laid and while the material is yet in a plastic condition. The blocks were formed either by interposing tar paper in the joints, or by dividing the surface of the yet plastic pavement into blocks, to a greater or less depth, with cutting instruments.

That the effects and advantages of so dividing the pavements into blocks are :

1. To give the sidewalk the appearance of being laid in separate blocks.

2. It prevents the blocks from cracking, either from shrinkage or from heaving by frost, the application of force or from either causes

3. The blocks can be removed and new blocks relaid without injury to the adjoining blocks or to the rest of the sidewalk.

4. The pavements so divided or cut into blocks remains generally in good condition, and is far better and more lasting pavement than they would be if not so divided or cut into blocks.

That concrete pavements laid as they were in solid sheets before Schillinger's patent, were almost certain to crack irregularly, and thereby render them unsightly and far more liable to destruction and to dilapidation, to such a degree as to render them impracticable and less useful.

The pavements laid by the defendant, which complainant alleges was laid in violation of the injunction, and constituted the contempt of Court on which this proceeding is based, was laid in large sections or sheets, and was divided into blocks on the surface by cutting the partially set, yet plastic concrete, with the edge of a trowel and other instruments, all of which is specifically described in the certificate of division of opinion.

The patent specifies the interposition of tar paper as the means by which the pavement is divided into blocks and each new block kept from welding with and forming a solid mass with the others already laid.

Schillinger made his blocks connect by a joint, which performed the compound operation of separating the blocks from each other sufficiently to gain the advantages of removing an injured block and replacing it with new material, of controling the cracking, and presenting the appearance of a block pavement on the surface to the eye, and at the same time leaving the blocks sufficiently joined together to have a water-tight joint between them. This he did by making first one block of the pavement, then placing a strip of tar paper against the side of the block so made, and then laying the next block against the tar paper—except for this tar paper the blocks would have adhered and been one solid stone,

and would have included the fatal defects of the old solid stone pavement. The tar paper, however, formed at once a separation and a joint between the blocks, and a new pavement was created.

The defendant in this case learned all about the Schillinger patented pavement, the kind of joint used in it, with its compound character of dividing and yet joining the blocks, its advantages, value and appearance.

Instead of using tar paper in the joints, he divided the surface of the pavement into blocks, by cutting lines a short distance into the pavement while it is yet sufficiently plastic to permit him to do it. By thus cutting the pavement into blocks at the surface, he obtained a division between the blocks sufficient to control the cracking of the blocks, also to permit the removal of one or more blocks, and the replacing of the same with new material, without injury to the adjoining blocks ; also, the appearance on the surface of a block pavement.

He left the material undivided below the cut made by the joint cutter, and by so doing, retained a close, water-tight connection between the blocks. The cut in the surface and the undivided material below the cut, together, form a joint that embody the compound operation of separation and joining together, to an extent that *practically*

is exactly measured by the same characteristics in the Schillinger joints. The operation of the two joints are exactly the same for all practical purposes; their advantages are the same; their appearance is the same, and their construction is so nearly alike as to be practically the same. In both there is a partial separation and yet a close connection. The solid material that is left undivided under the cut has the same practical effect as though it was removed and its place filled with tar paper. It has the same effect as though it was removed and its place filled with cement, floated into it from the surface. In each of these three cases the entire effect produced by putting or leaving the material in the joint, is to make a sufficiently close connection between the blocks —which with nothing there would be separated —to form a water-tight joint. The solid matter thus left in the pavement under the cut, is left there permanently and is interposed between the blocks during the process of formation, and such solid matter, in connection with the cut above it, performs all the service and operation of a strip of tar paper placed in the joints and extending from the top to the bottom of the pavement, just as described in the patent.

Such being the case, the law makes the cut of the joint-marker and the solid material underneath exactly the same thing as the tar paper in the

joint, and just as much of an infringement as though the tar paper had been interposed and the cut and material underneath had been left out.

We ask the Court to analyze the invention, and see what new means were used and what new effects were produced by those means. This the infringers have done long since. The infringers have long since learned that the tar paper had no value whatever as an ingredient or substance in the pavement. It was not put there to fill up space, but to perform an office—to produce an effect. That effect was to divide the pavement into blocks, and nothing else. Except for creating this division, the tar paper was rather an injury, since it is a perishable article, and in time will wash and work out of the pavement, while the stone will only have increased in hardness and been growing stronger. *Will not the pavements still be Schillinger pavements, after the tar paper is thus worked out of them?* Will not all of their advantages still remain? Will not the blocks still be protected from cracking? Will not the pavements be equally protected from the effects of heaving from frosts? Will they not still present the appearance of block pavements to the eye? Cannot the blocks still be removed without injury to the adjoining blocks? True, the joints may not still be water-tight, but many joints cease to be water-tight in the

Schillinger pavement while the tar paper is still in them. The infringers understood all these things. They not only understand that the only useful effect of the tar paper is to make a division of the pavement into blocks by a joint which is water-tight *when new*, but they also understand the effects of such division as above enumerated. They understand equally well that all the beneficial effects flowing from such division, will flow from a division of the pavement into blocks at the surface with a joint cutter. The known nature of stone is such that a division which is shallow, is as good and produces the same practical results as a division which is deeper. They therefore substitute the shallow division for the deeper one, leaving the solid material underneath the cut, and gain every single advantage that they would gain by using the tar paper division. They thus obtain a joint which is water-tight *when new*, but which opens from natural causes with lapse of time. They thus make a pavement in which the blocks can be, and very often *have been* removed and replaced without injury to the adjoining blocks; a pavement that presents to the eye the appearance of a block pavement, that withstands the effect of heaving from frosts, and in which the blocks are prevented from cracking.

The infringers understand that all these results in the Schillinger pavement are the direct results which flow from dividing the pavement by the tar paper. *They do not flow from the tar paper itself nor from the combination of the tar paper and stone. They all flow from the division* which the tar paper makes, *and nothing else.*

Understanding these things, the infringers make an *equivalent division by a well-known equivalent method,* and as a matter of course, instantly *obtain exactly the same results and none other.*

The several pavements made by the complainant and by several defendants in these cases demonstrate every minute of every day that one of the joints is an exact equivalent and substitute for the other in the strict sense of patent law. Both do the same things and accomplish the same results and by the same kind of operation. These results were first applied to pavements by Schillinger. Former concrete pavements were fatally defective for want of such results. While such joints are the mechanical substitutes and equivalents of each other in modern pavements, they are not equivalents or substitutes of anything used in former pavements. In the accomplishments of these results the patent covers a radical invention. It is not a patent which merely puts into the pavement a better joint than had been put into former concrete pavements, but it

is a patent which put into concrete pavements the *first* joint. It comes within the rule as laid down by the U. S. Supreme Court in McCormick *vs.* Talcot, 20 Howard, 402; and in Railway Co. *vs.* Sayles, 7 Otto, 556.

By substituting the words, "joint in a concrete pavement" for the word "divider" in the case of McCormack *vs.* Tolcott, the language of the U. S. Supreme Court would read as follows:

"If he be the original inventor of the device "or the machine called a joint in a concrete "pavement, he will have a right to treat as "infringers all who make joints in concrete pave- "ments operating on the same principle and "performing the same functions by analogous "means or equivalent combinations, even though "the infringing joint may be an improvement of "the original and patentable as such; but if the "invention claimed be itself but an improvement "on a known joint in concrete pavements by a "mere change of form or combination of parts, "the patentee cannot treat another as an infrin- "ger who has improved the original joint and "concrete pavements by use of a different form "or combination performing the same functions."

The language in Railway Co. *vs.* Sayles, 7 Otto, 556, is as follows:

"In such cases, if one inventor precedes all "the rest and strikes out something which in-

" cludes and underlies all that they produce, he " acquires a monopoly, and subjects them to " tribute."

The foregoing quotations merely apply the state of the art to the construction of the patent for the purpose of ascertaining the scope of the invention, and the scope of the invention is ascertained for the purpose of determining what different devices would be equivalents or substitutes of the particular devices described in the patent. So far as the patentee's invention has developed new results, effects and operations, which had never before been developed, so far his invention is radical, and all other devices which develop the same results, effects and operations, when placed in the same combinations, are equivalents or substitutes of his invention and are covered by the patent. The certificate of division establishes the fact that Schillinger was the first one to ever put dividing joints into a concrete pavement, and his dividing joint, for the first time, developed beneficial results, flowing from a dividing joint of any kind in a concrete pavement, laid while the material was in a plastic condition. In law, therefore, all other dividing joints in the same kind of a pavement, which develop the same beneficial results, are equivalents and substitutes of the particular kind of dividing joints which Schillinger described in his patent.

Every Judge who has decided this question has decided that the pavements laid and cut as the defendant laid and cut the pavement for William Wahl, were *in law* the pavements covered by the Schillinger patent, excepting only His Honor Judge Sawyer. In making his decision in this instance, Judge Sawyer expressed the gravest doubts as to the correctness of the construction which he has given the patent, and probably no one is more anxious than he that this Court will now entertain the cause, and reverse his construction of the patent if it is wrong.

Schillinger *vs.* Gunther, 2 Banning & Ardens, Patent Cases, 548 to 550.

Same *vs.* Same, 3 Ibid, 491.

Same *vs.* Same, 4 Ibid, 479.

Kuhl *vs.* Mueller, 21 Federal Reporter, 510.

Schillinger *vs.* The Greenway Brewing Co., 17 Federal Reporter, 244.

In the case of Kuhl *vs.* Mueller *supra* the defendant had divided the surface of the pavement into blocks, by pressing a fish line one-sixteenth of an inch in diameter into the surface of the partially set concrete pavement. The rule of law for which we contend is stated in clear and forcible terms in this decision, which says:

"But the exhibits produced (blocks from the "pavements laid by defendants) show lines of

" division clear, distinct and complete. If these " were produced by the use of the marker only, " it is incontestable that the use of the marker is " an infringement. If they were produced by the " trowel, the defendants are infringers, as has " been repeatedly held. Therefore, it is not nec- " essary to determine whether the marker only " was used. The exhibits establish the fact that " the pavement was divided while yet plastic into " blocks and sections, and if that result was ac- " complished by the trowel or by the marker, " *either is the equivalent of the tar paper* " *described in the specification of the patent under* " *which the complainant claims.*

* * * * *

" It has never been held that an equivalent " known at the date of the invention could be " used without infringing the patent. Such a " holding, if generally adopted, would amount " practically to the destruction of the law of " equivalents. (Walker on Patents, Sec. 354, *et* " *seq.*; Merwin on Patentability of Inventions, " chap. 4, p. 281, *et seq.*, and chap. 7, p. 527, *et* " *seq.*)

" Cutting of mortar and other plastic material " with the trowel was known long before the date " of Schillinger's invention; but that would not " be held to be a prior use which would invalid- " ate his patent. *Schillinger was the first to pro-* " *duce the result accomplished by his tar-paper.*

" He is entitled, and so is the complainant as his " assignee, to all means known at the date of his " patent, by which the same result can be pro- " duced; or, in the language of his claim, to tar- " paper or its equivalent."

The certificate of division establishes the fact that Schillinger was the first to produce the results accomplished by his tar paper. It also establishes the fact that the cuts or divisions made by the trowel and other instruments in the partially set concrete, are the equivalents of the divisions made by the tar paper. Also that the trowel and other instruments used are the equivalents of the tar paper for making the divisions.

Nothing is left for this Court to decide except the question of pure law, as to whether the patent should be so construed as to cover these equivalents or not.

We think ample authority is found for deciding this question in the affirmative in numerous decisions of this Court.

See Blake *vs.* Robertson, 4 Otto, last part of page 732 and first part of page 733.

Respectfully submitted,

M. A. WHEATON,

Counsel for Plaintiff in Error and Appellant.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

The California Artificial Stone Paving Co.,

vs.

Charles A. Molitor.

Defendant's Brief on Contempt Proceedings.

JOHN L. BOONE,
Solicitor for C. A. Molitor.

Filed ..... *A. D. 1884.*

Clerk.

By ..... *Deputy Clerk.*

SAN FRANCISCO:
GEO. SPAULDING & CO., GENERAL BOOK AND JOB PRINTERS,
414 CLAY STREET.

In the Supreme Court

OF THE

UNITED STATES.

CALIFORNIA ARTIFICIAL STONE PAVING COMPANY,
Complainant and Appellant,
vs.
CHARLES A. MOLITOR.
Defendant and Respondent.

Defendant's Brief on Certified Contempt Proceedings.

This matter comes before this Court upon a Certificate of Division of Opinion upon three propositions made by Hon. Lorenzo Sawyer, United States Circuit Judge for the District of California, and Hon. George M. Sabin, United States District Judge, sitting with Judge Sawyer, at the hearing of the motion.

The suit was a bill in equity for an injunction to restrain the infringement by the defendant of re-issued letters patent No. 4364, dated May 2, 1871, and set out by the Certificate of Division.

Upon the final hearing of this case a decree was entered in favor of the complainant, as prayed for in the bill, and the usual injunction issued and served upon the defendant. Subsequently the defendant was cited to appear before the Court to show cause why he should not be punished for a contempt for having disobeyed the said injunction. Whereupon the proceedings set out in the Certificate of Division were had.

The three questions upon which the Judges disagreed are as follows:

1.—Whether the laying of said concrete pavement of plastic material on the ground, in the manner stated, and dividing it into smaller blocks upon the surface, by cutting across the surface of the larger blocks with a trowel, and afterward running the marker along the line of the cutting with the trowel, in all respects as hereinafter stated, constitutes an infringement of the patent to Schillinger set out in this certificate?

2.—Whether the laying of the said concrete pavement of plastic material on the ground in the manner stated, and dividing it into smaller blocks upon the surface by cutting across the surface of the larger blocks by running the marker without

any other cutting with a trowel or other instrument than the marker described, across the blocks on a line previously marked as a guide in all respects in the manner as hereinbefore stated, thereby controlling the line of cracking, and obtaining in a greater or less degree the advantages pertaining and belonging to pavements laid in all respects in accordance with the specifications of said Schillinger's patent, constitutes an infringement of said patent?

3.—Whether the defendant Molitor, by constructing the said pavement in all respects in the manner hereinbefore stated, is guilty of violating the injunction granted and made perpetual by the decree in this case?

The logical examination of the questions involved in this matter, requires us to consider and determine—

1st. The nature and character of the Schillinger invention.

2d. The specifications and claims of the Schillinger reissued patent.

3d. The specific acts of which the defendant has been found guilty.

ARGUMENT.

What was the Schillinger Invention?

The testimony in the case discloses the following facts, *as the state of the art* of manufacturing artificial stone for pavements and other kindred purposes at the date of the Schillinger patent, viz: Prior to said invention, concrete pavements had been laid in solid sheets, but had never been divided into blocks during the process of formation, while the pavement was being laid in its place upon the ground and the material yet in a plastic condition, except when laid in blocks, as shown by the disclaimer in said reissued letters patent. From this we conclude that Schillinger was the first man who successfully made and laid a concrete block or sectional pavement, in the manner described in the patent, and that his invention was simply the discovery of a *new process* for laying this artificial stone pavement in blocks and that the patent simply covers the process described. There were two results accomplished:

1st. Being a *block* pavement with well defined joints between the several blocks, and the blocks being small, would "give" at the joints, so that they would not crack from the effects of expan-

sion and contraction caused by heat and cold: And, 2d. Any of the blocks could be removed at pleasure, without injury to the adjacent blocks. It may be said that these results, in a greater or less degree, were accomplished by the process discovered and patented by Schillinger. It is found by the Court that these objects, in a greater or less degree, are accomplished by the process used by the defendant Molitor. We will elaborate this question further on, and now proceed to the consideration of our second point, to-wit.:

The Specifications and Claims of the Schillinger Re-issued Patent.

The claims of said patent are as follows:

1. The concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.

2. The arrangement of tar paper, or its equivalent, between adjoining blocks of concrete substantially as and for the purpose set forth.

In the specification of the patent it is stated that "in cases where cheapness is an object, the tar paper may be omitted and blocks formed without interposing anything between their joints." Subsequently, however, the patentee

filed a formal disclaimer to this portion of the specification, so that as it now stands the specification refers to and the drawings illustrate a sectional concrete pavement, *combined with the joints of which are strips of tar paper*, or its equivalent, and the claims of the patent can only cover such a pavement.

In this case the respondent was originally adjudged to have infringed the rights secured by the patent, by reason of having pressed into the joints made by the cutting of the large sections into blocks with a trowel, a fine concrete which was held to be the equivalent of the tar paper, as it accomplished the objects claimed to be gained by the patented inventions, viz., producing a suitably tight joint and yet allowing the blocks to be raised separately without affecting the block adjacent thereto and allowed the several blocks to heave separately from the effects of frost, but no such question as this is presented in this record. The certified facts show that the defendant Molitor laid the pavement now in dispute in the following manner: He curbed or bulk-headed the end of the sidewalk where he began and laid a moveable joist or scantling about five feet from the curb or bulkhead at the beginning of the sidewalk, extending from the house to the curbstone of the street, the distance from the house to the curbstone being about twelve feet. He then filled in

the space between the bulkhead or curb and scantling with plastic material, composed of coarse gravel and cement, to the depth of between three and four inches, and then tamped it down solid with an iron tamper or rammer. He then put on over that a course from a half to three-fourths of an inch thick of finer material, being mostly cement or a surface. He then, with a float or species of trowel, or some kind of implement made for the purpose, floated and smoothed over the surface while yet in a soft or plastic condition, so as to leave it when hardened with a smooth polished surface.

The block thus made is about two feet wide by twelve feet long. After being thus polished and finished on the surface and after the cement was partially set and partially hardened, but before it had become solidified stone, the respondent laid a straight edge across the large block at regular distances of about two feet, and in some instances ran the point and edge of the trowel along the straight edge, cutting slightly into the surface, making a mark or shallow cut in the material along the line of the straight edge, but in some instances at least cutting to the depth of half an inch to an inch and nearly or quite through the surface course; in the other, not so deep, only making a shallow cut or line. He then ran a marker, consisting of a small paralellogram of

smooth sheet steel like the blade of a trowel $2\frac{1}{2}$ by $3\frac{1}{3}$ inches, beveled upwards ftom the centre from the underside, which beveling will nearly or quite double the extreme depth from the general surface with a thin, lightly rounded lip or rib running around the centre from the blade one-sixteenth of an inch, the instrument having a handle by which to work it. This made a depression in the surface along the cut or line drawn by the trowel to the depth at least of one-sixteenth of an inch, in addition to the depth of the depression created by the beveling, by which the surface was divided into squares, *giving the sidewalk the appearance of having been laid in separate blocks*, like the pavement constructed under the Schillinger patent. Sometimes also the blocks were marked off with this marker alone, without cutting with the trowel, by running it along a line or mark made with a snap-line, such as is used by carpenters to mark lines, and following this line so made with a marker the marker cutting to the depth of one-sixteenth of an inch in addition to the slight depth made by the bevels on the face of the instrument. The large block was thus divided on the surface by these cross-cutting and markings into *six equal squares*, giving that part of the sidewalk *the appearance on the surface* of having so many separate blocks or squares. When this block was finished the scantling was moved along

far enough to make a second similar block across the sidewalk, which was constructed and marked off into squares in the same way. The new block abutting against the first block formed on that side, and the marker was run along the line between the two blocks, distinctly marking that line in the same manner as the cross-lines are marked, and thus the process was repeated until the sidewalk was completed.

It is also found and certified by the Judge in this matter that the effect, both of the cutting and marking and the effect of the marking alone with the marker without cutting with a trowel, as herein described, is: 1. To give a sidewalk *the appearance* of having been laid in separate blocks, like the pavement made under the Schillinger patent. 2. It prevents the blocks from cracking, whether from shrinkage, heaving from frost, or the application of force, or from other causes, an effect or result first obtained by Schillinger invention—large blocks being extremly liable and most certain to crack irregularly, and thereby render them unsightly and far more liable to destruction, or to become dilapidated to such a degree as to render them impracticable, or at least less practicable and less useful. So that it may be fairly conceded that the material and substantial results, to a greater or less degree, of the Schillinger invention are obtained by the

process adopted and used by the defendant in this case. And it is an elementary principle of patent law that a patentee is entitled to all the benefits which result from his invention, whether he has specified them all in his patent or not; yet it does not follow that because another secures the same advantages resulting *from* a patented invention that he is therefore an infringer, even though the patentee was the first to accomplish the object attained.

In the case of *O'Reilly* vs. *Morse*, 15 How. (U. S.) p. 118, this Court said:

"It has always been held that the patent em-
"braces nothing more than the improvement
"described and claimed as new, and that any one
"who afterwards discovered a method of accom-
"plishing the same objects substantially and
"essentially differing from the one described, had
"a right to use it. * * * Who ever discovers
"that a certain useful result will be produced in
"any art, machine, manufacture or composition
"of matter, by the use of certain means, is enti-
"tled to a patent for it, provided he specifies the
"means he uses in a manner so full and exact
"that any one skilled in the science to which it
"appertains, can, by using the means he speci-
"fies, without any addition to or subtraction from
"them, produce precisely the result he describes,

"* * * and the patent confers on him the "exclusive right to use the means he specifies to "produce the result or effect he describes and "nothing more. * * * He must describe the "manner and *process* as above mentioned and the "end it accomplishes; and any one may lawfully "accomplish the same end without infringing "the patent, if he uses means substantially dif- "ferent than those described."

The Court therefore declared void one of the claims of Morse's patent, by which he sought to broadly cover the printing at a distance of intelligible characters by the use of electro-magnetism, although he was undoubtedly the original discoverer of the art, and the Court limited his patent to the specific means described in his specification for accomplishing the result attained.

Substantial and striking differences are to be found between the process described in the Schillinger patent and that adopted and used by the defendant. In the first place, it is a misnomer to call the defendant's pavement a block pavement, for, in fact, there are no blocks except the long rectangular pieces extending across the sidewalk and being two feet by twelve feet. As we understand it the complainant does not claim that these are such blocks as are referred to in the Schillinger patent. The question to be determined be-

ing, whether the marking of this long narrow piece of artificial stone with the instrument called a marker, on the surface to the depth of say one-twelfth of an inch, makes it a block pavement substantially such as that described in the patent. Does such marking create such a joint *between the several squares thus marked off* as is contemplated by the patent. It is *evident* from the specifications and drawings of this patent that the pantentee never contemplated that a simple scratch or mark across the surface of any artificial stone pavement would be claimed to be such a free and yet water-tight joint between the blocks as he describes and claims in his patent. Schillinger says "his invention relates to a concrete pavement which is *laid* in sections," etc. Evidently using the word "sections" as synonymous with the word "blocks," for he claims "a concrete pavement *laid* in detached blocks or sections." This language can have but one meaning, and that is, each separate block was completed before the adjacent block was commenced. Nothing of that sort was done by the defendant. Now when two adjacent blocks were completed the result would be just what Schillinger contemplated—an open free joint or space between them. This condition of the block joints, or spaces between the blocks was well understood by Schillinger. and he disclaimed this as being any part

of his invention. Up to this point there was nothing new; nothing that he claimed as new; nothing for which he desired a patent, and of course it was open to the public to make these blocks precisely as Schillinger made them; making and laying them side by side just as he did, provided he interposed nothing in these open joints or spaces between the blocks.

This cannot be controverted, for it is the identical process disclaimed. Now, then, no blocks were formed by the defendant, and of course there could be no open joints or spaces between blocks; but it is claimed that because this mark across the surface tends to weaken the pavement along the mark so as to control to some extent the cracking of the pavement, and thereby obtaining some of the advantages of the Schillinger pavement that Molitor is therefore an infringer of the patent.

It will be observed that the Court has not found that defendant made any blocks, but that he simply marked off the surface of the plastic concrete and made the surface look like a block pavement. It will probably be contended by the other side, that at least to the extent of the depth of the mark or cut, that is so far down as the separation extends, so far the pavement is divided into blocks, and that such marking there-

fore comes within the claim of the Schillinger patent. It has been claimed by the printed argument, filed in this case in the Court below, that the *apparent* divisions made by these marks "are made by interposing something during the process of formation," and that the point of a trowel, or the cutting bead of the marker, was in fact the interposition of something in the joints during the process of formation, and that the point of the trowel or the cutting bead of the finishing tool, was the equivalent of Schillinger's tar paper. It seems to us that such a claim is exceedingly *far-fetched*. In the first place, there was no joint in existence for the point of the trowel or cutting bead of the marker to enter, while the specification and claim of the patent unquestionably contemplate the pre-existence of the joint or open space between the blocks into which something substantial and permanent is interposed.

The specification says: "with the joints of this "sectional concrete pavement, are combined strips "of tar paper or equivalent material, arranged be- "tween the several blocks or sections in such a "manner as to produce a suitable tight joint," etc., and such a combination or arrangement of the *separate blocks, joints or open spaces, between them and tar paper, or equivalent material*, is all that is covered by the claims of the patent.

It cannot be denied that Schillinger contemplated that the tar paper should perform an important function in the construction of his pavement, and that it did constitute an important and material element in his combination, for in the specifications further on he says: "After completing one block, a, I place the tar paper, "b, along the edge where the next block is to be "formed, and I put the plastic composition for such "next block up against the tar paper joint and "proceed with the formation of a new block until "it is completed. In this manner I proceed until "the pavement is completed, interposing tar paper "between the several joints as described. The pa-"per constitutes a tight water-proof joint, but it "allows the several blocks to heave separately "from the effects of frost," etc. And again, "the "paper when placed against the block first formed, "does not adhere thereto, and therefore the joints "are always *free* between the several blocks, al-"though the paper may adhere to the edges of the "block or blocks formed after the same has been "set up in the place between the joints."

The language of this specification, although in some parts somewhat contradictory and inconsistent, yet taken as a whole, seems to be too plain to admit of doubt or controversy. They evidently contemplate a pavement laid in separate

and detached blocks, and into the spaces between the blocks, as they are constructed, is inserted strips of tar paper, so that to make this pavement are required three distinct and essential elements, to wit: *the blocks of pavement which are to be made and laid; one at a time, and each separate and distinct from the other; the joint or open space between the blocks, and the strips of tar paper which are inserted in these open spaces,* and when these three elements are combined in the manner described, they make and constitute the improvement in concrete pavements covered by the patent.

Now, as already shown, to make these blocks of pavement in the manner precisely as shown in the specifications, omitting therefrom the insertion of tar paper or equivalent material into the joints or open spaces between the blocks, would not be an infringement of this patent.

Now then, if that be true, (and the contrary is not even claimed by the patentee,) upon what theory can it be claimed that, even had the defendant Molitor, with his trowel, cut these large sections into *separate* and *distinct blocks*, omitting to place tar paper or any material whatever into the cuts made by the trowel, be an infringement?

In other words, suppose that Molitor, instead of simply marking the surface of the plastic con-

crete, so that when his pavement was completed *it looked like a block pavement*, he had with the trowel or any suitable instrument whatever, unquestionably cut entirely through the plastic concrete, thereby making *in fact a block pavement with well defined open joints between the blocks*, the complainant will not claim that this would be an infringement of the patent. In the first place the joint would not be water-tight, and the element of some substantial material interposed in the space or joint between the blocks to make the joint water tight, is wholly wanting.

But it may be contended that this marking or cutting on the surface is an infringement because—*first*, it divides the pavement into blocks; *second*, that there is a joint or open space formed between the blocks, and that the concrete below the bottom of the cut is the equivalent of the tar paper. This position must be fallacious for the following reasons:

First, the large mass of concrete is not divided into separate or detached blocks. If it should be said that the marks on the surface divided the surface to the depth of the cut into blocks, and thereby forming partial blocks, so as to come within the patent, on that point still the argument fails, because there is nothing interposed or placed between the edges of such partial blocks, but it is

left entirely free and open—a mere open channel running along the surface—and by what process of reasoning can it be claimed that the undisturbed concrete below the cut is the equivalent of tar paper, is something we leave for the ingenuity of the other side. That part of the pavement below the channel, at least, is not divided into blocks of any kind. Below the cut there is not, nor can there be any joint with which to combine strips of tar paper nor any material whatever, and in the space or opening or shallow channel made on the surface, as shown, there is absolutely nothing. How can such a channel meet the declaration of the patent, that "with the joints of this sectional concrete " pavement are combined strips of tar paper or " equivalent material arranged between the several " blocks or sections in such a manner as to produce " a suitable tight joint," etc. Or the further dec- " laration that "the paper constitutes a tightwater- " proof joint." Or that " the paper when placed " against the block first formed does not adhere " thereto, and therefore the joints are always free " between the blocks," etc.

Again, if Molitor's open channel upon the surface of the pavement is the equivalent of the joint referred to in the patent, then we ask with what is that joint combined so as to make it water-tight and at the

same time a free and open joint; and, again, if the undisturbed plastic material below the channel or cut is claimed to be the equivalent of the tar paper, it absolutely fails to perform any of the functions performed by the tar paper, to-wit, a. It is not arranged between any blocks, because no blocks can in any sense said to be formed below the bottom of the channel or cuts. b. It is not between joints of adjacent blocks, nor anything else. c. It is not placed along the edge of one block where the next block is formed. d. No block is placed up against it *during process of formation.* e. It does not constitute a tight waterproof joint or any joint at all, and if it did constitute a joint it is not a free nor open joint, but we contend that it is an absurdity to insist that there is any joint, or anything resembling or performing the functions of a joint, at least below the bottom of the channel.

Equivalents.

No one claims that the defendants have used the process so "exactly" described in the specification in the laying of the pavement claimed as an infringement.

Have they used an equivalent? What is an equivalent in cases involving processes?

The substantial equivalent of a thing is in the

sense of the patent law the same as the thing itself.

Machine Co. vs. *Barphy*, 97 U. S. Rep., 120.

If the defendants' process does not produce the same result, then it is not an equivalent.

The following definition of equivalent is given in case of the *Goodyear Dental Vulcanite Co.* vs. *Davis*, in the 12 Otto, (102 U. S., Rep.) p. 220: "It may be conceded the patentee is protected against equivalents for any part of his invention. He would be, whether he claimed them or not. But when a product arrived at by certain defined stages or processes is patented, only those things can be considered equivalent for the elements of manufacture, which perform the same function in substantially the same way, the same result may be reached by different processes, each of them patentable, and one process is not infringed by the use of any number of its stages *less than all of them.*"

If two machines do the *same work* in substantially the *same way*, and accomplish the *same result*, they are the same.

Cahoon vs. *Ring*, 1 Fish., 397.

Foss vs. *Herbert*, 2 Fish., 31.

Union Sugar Refinery vs. *Matheissen*, 2 Fish., 300.

Waterman vs. *Thomson*, 2 Fish., 461.

White vs. *Baker*, 3 Fish, 66.

The term equivalent has two meanings, the one relates to the *results* that are produced, and the other to the mechanism by which those results are produced.

Johnson vs. *Root*, 1 Fisher, 351.
Burden vs. *Corning*, 2 id., 477.

An equivalent of any substance is another substance having similar properties and producing substantially the same effect.

Matthew vs. *Skater*, 1 Fish., 602.

"The doctrine of equivalents applies to processes, whether composed of a single step or a combination or succession of steps. * * * When a process consists of a series of different steps, it is really a combination of such steps, and if in place of one of them, another step is made use of which a person skilled in the art to which the process appertains, knows from past experience or accumulated knowledge, will answer the same purpose, the substitution of such other step is a mere equivalent. Simonds, pages 28–31.

In the plaintiff's process there are a series of steps—a combination of steps, interposing tar paper, or its equivalent being one of them. In the defendant's process tar paper or its equivalent is omitted and the trowel is inserted, saw tooth fashion instead, without any intention to make detached blocks, and none in fact are made. The

processes are different in those particulars, and the results are not the same—in the one case detached blocks are the result, in the other there are no detached blocks. An equivalent must produce a detached block or it is *not* an equivalent.

No principle of patent law is more clearly settled than the rule that a patented combination is not infringed unless all the elements of the combination are used. This patent may fairly be construed as a patent for a combination the elements of which are the several separate blocks of concrete pavement, the joints or open spaces between them and the tar paper—the latter being inserted and allowed to *permanently remain* in the said joints. There are, however, properly speaking, no joints in the defendant's pavement except at those places where one long section was laid up against another, and then nothing was interposed during the process of formation except the marker, which was run along the joint at the surface, and in neither of those joints nor the surface cuts made by the marker, was any tar paper or any material whatever used, unless it be held tnat the marker itself, which was applied to make a shallow division line and then removed, was the equivalent of the permanently interposed tar paper.

Unquestionably Schillinger contemplated the

combining of some substantial and material substance with the joints which should be therein inserted and there to permanently remain. No other construction can be placed upon the language of the specification, viz: "With the joints "of this sectional concrete pavement are combined "strips of tar paper or equivalent material arrang-"ed between the several blocks," etc. If this be correct, we insist that at least two elements of the combination are wanting, to-wit., certainly the tar paper, or its equivalent material, and second, the free joint between the blocks.

Again, complete equivalents must be interchangeable. Under the complainant's theory in this case, Schillinger would have been entitled, had he applied for it, to a patent for a concrete pavement laid in a large mass and having made along its surface open cuts of the depth of one-twelfth, more or less, of the thickness of the whole body, the cuts recurring at such frequent intervals that any cracking which might ensue from natural or other causes, would be controlled thereby. Such a patent being secured, a person constructing a pavement like those now made by the complainant and described in his patent, would be an infringer, as his tar paper water-tight joints would be practically the same thing as such supposed patentees' open cuts; and furthermore,

if the two methods of construction are exactly equivalent, the one to the other, the person inventing the tar paper joint would not be entitled to a patent for such improvement, although experience may have demonstrated that such water tight joints were wanting in the pavement covered by such supposed patent, at least after it had cracked along the line of the mark or cut.

Nor does this patent pretend to claim every means by which the concrete pavement of detached blocks can be laid, for by his disclaimer he has declared that the laying of the blocks without interposing tar paper or its equivalent material between them, is no part of his invention and is open to the public, and it seems to us that the process adopted by Molitor makes a pavement much more like that disclaimed by Schillinger than that covered by the claims of the patent, for if Molitor has made a block pavement at all, certainly no tar paper is combined with the joints thereof, and if there are any joints in the Molitor pavement, the result would be exactly what is described in Schillinger's disclaimer, viz: "The joints would soon fill up with sand or dust," etc.

CLAIM.

There are two claims to this patent, but they evidently mean and cover precisely the same

thing, to wit, the process of laying concrete pavement in detached blocks, with tar paper, water tight joints, in manner and form described in the specifications; and either claim must be construed as a combination containing the elements already stated, to wit, the separate and detached blocks of concrete pavement, the joint or space between them, and the permanently interposed tar paper. A claim for a combination of any number of elements is not infringed unless the infringing machine contains all the material elements patented, or proper substitutes for them *well known to be such* at the time when the patent is granted.

Gould vs. *Reis*, 15 Wall., 187.
Case vs. *Brown*, 2 Wall., 230.
Seymour vs. *Osborne*, 11 Wall., 876.
Prowter vs. *Ruggles*, 16 Peters, 341.
Eams vs. *Godfrey*, 1 Wall., 79.
Brooks vs. *Fisk*, 15 How., 212.

The rule also is, that two combinations are not the same, if one substantially differs from the other in any one of its parts.

Water Meter Co. vs. *Desper*, 11 Otto, 332.

A rule of construction is, that in order to determine the true scope of a claim, the Court must take and read the language of the claim in connection with the body of the specification.

Terrill vs. *Mich. South.*, 1 Wall., 491.

When we read the claim and specifications of this patent together, it seems to be too plain to admit of controversy that the essential idea of the patentee at the time was that some substantial and material substance should be permanently interposed between the several detached blocks of his pavement; and if that be true, then no process of laying this concrete pavement can infringe this patent that omits placing some material substance between the blocks, there to *permanently remain* and which of itself constitutes a tight water-proof joint, because the specification says in so many words, "*the paper constitutes a tight water-proof joint*," etc. In the face of this view, can it be consistently argued that the bevel or sharp edge of the marker which is instantly removed, and which of itself is not in any manner combined with the joint, nor does it have anything whatever to do with the joint, is the equivalent of Schillinger's permanently interposed tar paper.

Then what was Schillinger's invention? He did not invent the plastic concrete, nor did he make any discovery in a process of making the blocks as such; nor did he discover that if two or more detached blocks were laid down side by side, either in the process of formation or otherwise, that there would be a joint or open space between them; he did not discover that these joints or

open spaces between the blocks would fill up with sand or dust, and that the pavement would thereby be rendered sufficiently tight for many purposes, for all these things are specifically disclaimed; but he did discover that by making one block, and by placing strips of tar paper or its equivalent material up against its edge, and then by constructing the next block against it, and so on, each succeeding block being formed after the adjacent block had set, that this strip of tar paper so combined with the joint and the blocks as to make a water-proof joint, yet allow the several blocks to heave separately and be removed at pleasure, without injuring the adjacent blocks, and his patent can only cover the process that he has described.

It may be argued by the other side that, because Molitor has probably obtained many of the advantages possessed by the Schillinger patent, and for this reason he is to be adjudged an infringer, but it is elementary patent law that a *new principle, result or effect*, is not patentable except when the discoverer thereof has connected it with some particular medium or mechanical contrivance, through which it acts upon the material world. He then controls his discovery through the means by which he has brought it into practical action. It is for the discovery of some practical method

or *means* of producing the beneficial result or effect that a patent is granted, and not for the result or effect itself.

Corning vs. *Burden*, 15 How., (U. S.) 268.

And if Molitor shall have obtained or appropriated some or all of the benefits or advantages of the Schillinger pavement, and has done so by means substantially different from those described in the Schillinger patent, then he does not infringe.

To accomplish the same results as those obtained by the process described in Schillinger's or any other patent, is the lawful prize of every inventive mind and industrious hand, and the law only imposes upon him the obligation to obtain such results by substantially different means.

This we most respectfully contend has been accomplished by the defendant Molitor in this case.

Respectfully submitted,

E. M. MARBLE, AND
J. L. BOONE,
Solicitor for C. A. Molitor.

ADDENDA.

We file herewith, and as a part of this brief:

1.—A small piece of artificial stone in a cigar box, made by Molitor with one of the markers referred to in the certificate and brief. By removing the cover marked "Top," the top or upper surface will be seen exactly as it appears upon the sidewalk. This exhibit is marked "A."

2d.—The identical "*marker*" used by Molitor in the construction of the pavement, referred to in the certificate in this proceeding, and in making the stone exhibit "A." The marker will be found in a small box marked exhibit "B."

E. M. MARBLE, AND
J. L. BOONE,
Solicitors for Defendant Molitor.